

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 27 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHELL D. EICHER,)	2 CA-CV 2008-0188
)	DEPARTMENT A
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ANDREW DIODATI,)	Appellate Procedure
)	
Defendant/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. DV2008-0898

Honorable Karen Nygaard, Judge Pro Tempore

DISMISSED IN PART
AFFIRMED IN PART

Law Office of Patrick Coppen, P.C.
By Patrick C. Coppen

Tucson
Attorney for Plaintiff/Appellant

H O W A R D, Chief Judge.

¶1 Appellant Michell Eicher appeals the trial court's decision denying her request for a protective order and granting summary judgment in favor of appellee, Andrew Diodati. She also challenges the court's subsequent award to Diodati of \$5,000

in attorney fees. For the following reasons,¹ we dismiss the challenge to the procedure and affirm the sanctions award.

Facts and Procedural History

¶2 On May 22, 2008, Eicher petitioned the trial court for a protective order against Diodati. The court held an ex parte hearing on the petition, finding reasonable cause to issue the order of protection. After Diodati was served with the order of protection, he filed a motion for summary judgment, arguing Eicher's petition was legally improper on several grounds. Eicher then filed a motion to strike, inter alia, the summary judgment related pleadings or for a protective discovery order.

¶3 At a status hearing on Diodati's motion for summary judgment, the trial court ruled that the Arizona Rules of Civil Procedure applied to an order of protection proceeding. The court then granted Diodati's motion for summary judgment and dismissed the order of protection. Diodati had previously filed a motion to compel, which included a request for sanctions, due to Eicher's failure to respond to interrogatories. After the court granted the motion for summary judgment, Diodati filed a motion for attorney fees as a sanction. The trial court granted Diodati \$5,000 in fees, finding that Eicher "unnecessarily expanded the scope of the proceedings by resisting

¹Diodati's failure to file an answering brief could be considered a confession of error as to any debatable issue Eicher had raised. *See Thompson v. Thompson*, 217 Ariz. 524, n.1, 176 P.3d 722, 724 n.1 (App. 2008). But we are not bound by any such confession. *Id.*; *see also State v. Rhodes*, 219 Ariz. 476, n.2, 200 P.3d 973, 975 n.2 (App. 2008). And Eicher has failed to raise debatable issues.

legitimate discovery requests and by filing voluminous and superfluous pleadings.” Eicher appeals from these rulings.

Discussion

¶4 Eicher argues the trial court erred by entering summary judgment in favor of Diodati, thereby denying the requested order of protection. But she also notes that the issue may be moot because the time during which the order of protection would have been effective has passed. We will generally dismiss an appeal as moot when circumstances have changed such that our action will have no effect on the parties. *See Exodyne Props., Inc. v. City of Phoenix*, 165 Ariz. 373, 376, 798 P.2d 1382, 1385 (App. 1990); *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988). And “[a]n order [of protection] expires one year after service on the defendant.” A.R.S. § 13-3602(L); *see* Ariz. R. Protective Order P. 1(M)(2).

¶5 Here, the original order of protection was issued on May 22, 2008, and was served the next day. The order therefore would have expired, at latest, on May 22, 2009, and this issue is moot. *See Vinson*, 159 Ariz. at 4, 764 P.2d at 739. Citing *Big D. Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 789 P.2d 1061 (1990), Eicher contends that this court should nevertheless consider the issue because it involves “significant questions of public importance that are likely to recur.” But Eicher does not explain what these questions of public importance are or why they might recur in the future. We therefore decline to exercise our discretion to consider this moot issue on appeal. *See Dunwell v. Univ. of Ariz.*, 134 Ariz. 504, 507, 657 P.2d 917, 920 (App. 1982) (“Where the matter is

of considerable public importance or the principle involved is a continuing one, the appellate court may, in its discretion, decide the issues of law involved.”).

¶6 Eicher further argues the award of attorney fees should be vacated, claiming summary judgment was not proper and is, moreover, not available to the trial court in matters of protective orders. But she does not cite any authority for the proposition that the trial court’s use of an allegedly improper procedure² would excuse her violation of Rule 11, Ariz. R. Civ. P., or A.R.S. § 12-349. We will not vacate sanctions simply because counsel felt that the court had used improper procedure prior to imposing those sanctions.

¶7 Eicher also contends the trial court erred by granting Diodati attorney fees without first holding a hearing, as required by A.R.S. § 13-3602(P) and Rule 2(C), Ariz. R. Protective Order P. The court, however, awarded attorney fees pursuant to § 12-349, Rule 11, Ariz. R. Civ. P., and Rule 2(C), Ariz. R. Protective Order P. Eicher challenges the propriety of the court’s ruling under Rule 11 and Rule 2(C), but not § 12-349. By failing to challenge the court’s award on one of the three grounds, Eicher abandoned the argument, and we uphold the award on this ground. *See DeElena v. S. Pac. Co.*, 121 Ariz. 563, 572, 592 P.2d 759, 768 (1979) (issues not argued on appeal are considered abandoned and provide no basis for overturning trial court’s ruling); *cf. Antonio M. v. Ariz. Dep’t of Econ. Sec.*, 222 Ariz. 369, ¶ 4, 214 P.3d 1010, 1012 (App. 2009) (affirming trial court when appellant challenged only one of two grounds for order).

²We need not decide whether the trial court had used an improper procedure because the propriety of the ruling is moot. *See supra* ¶ 5.

¶8 Finally, Eicher argues the trial court violated her federal due process rights by imposing attorney fees without a hearing. But she did not raise this issue in the trial court, and it is therefore waived absent fundamental error. *Maher v. Urman*, 211 Ariz. 543, ¶ 13, 124 P.3d 770, 775 (App. 2005); *cf. State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (objection not preserved at trial forfeited on appeal absent fundamental error). We do not detect error. Eicher received notice and an opportunity to be heard on appellee’s request for sanctions by receipt of his written request. She was heard through her written response and later motion for reconsideration. Due process does not require that a hearing be held before the court can impose sanctions. *See Robinson v. Higuera*, 157 Ariz. 622, 624, 760 P.2d 622, 624 (App. 1988).

Conclusion

¶9 In light of the foregoing, we dismiss the challenge to the procedure as moot and affirm the sanctions award.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003).